Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1976

~~76-92~~ 1

No. .....

AMERICAN HONDA MOTOR COMPANY, INC.

Petitioner,

v.

CITY OF FARMERS BRANCH, TEXAS AND THE TAX ASSESSOR-COLLECTOR OF THE CITY OF FARMERS BRANCH, TEXAS,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, the CITY OF FARMERS BRANCH and T. E. WALDRIP, its Tax Assessor-Collector (hereinafter sometimes jointly referred to as "the respondent"), respectively pray that a writ of certiorari not be issued to review the judgment of the Texas Supreme Court entered in this proceeding on May 5, 1976.

RESPONDENT'S POSITION

1. This Court does not have jurisdiction under 28 U.S.C. § 1257(3) to decide the issue of the prospective or retroactive application of *Michelin Tire Corporation v. Wages*, 423 U.S. 376 (1976) 96 S. Ct. 184 (1976) in this case.

2. This is not a proper case for review of that question:

(a) The facts and circumstances of this case are identical to those in *Michelin* so that identical treatment should be accorded in each case.

(b) Whether or not the standards for prospective limitation stated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) are mandatory upon state courts, those standards would not require such limited treatment in this case.

STATEMENT OF THE CASE

The petitioner has omitted several facts from its Statement of the Case which we believe to be relevant.

The respondent had always denied the exemption claimed by the petitioner from ad valorem tax levied on its imported items stored in its Farmers Branch warehouse. January 1, 1972 was the first assessment date that the petitioner was subject to municipal taxation by the respondent. This is not a case where the respondent is attempting to assess back taxes based upon this Court's decision in *Michelin*, as intimated in the petitioner's brief. (Pet., p. 9.) There was no change in the respondent's position or policy concerning the taxability of these imported items.

The exemption claimed by Honda for each subsequent year has been disallowed and Farmers Branch has included the imported items on its tax rolls for each year. The petitioner and the respondent entered into an agreement to delay the collection of the taxes, pending the outcome in this case, if Honda kept adequate security on hand for the payment of those taxes.

Farmers Branch, from the inception of this litigation, has always raised as one of its specifically stated arguments

that *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1972) (expressly overruled by *Michelin*) was wrongly decided.[1] The taxing authority in *Michelin*, Gwinnett County, Georgia, had not argued or briefed the basis of that ultimate decision. This Court, nevertheless, held that a non-discriminatory ad valorem tax upon imports no longer in the process of importation was not an "import" or "duty" within the meaning of the Import-Export Clause.

This Court was presented with an opportunity to decide the exact issue raised by the petitioner in its petition for writ of certiorari. Michelin, in its motion for rehearing, argued that the decision should be given only prospective effect. This Court denied that motion for rehearing.

The petitioner in the case at bar has subsequently moved outside the municipal boundaries of Farmers Branch. Therefore, since this Court decided *Michelin* after January 1, 1976, the normal assessment date, if that decision is given only prospective effect, Farmers Branch will be unable to collect any taxes from the petitioner or from any other similar taxpayer which chooses to shift its location during 1976.

THE WRIT OF CERTIORARI SHOULD NOT BE ISSUED

The respondent respectively prays that a writ of certiorari not issue on any or all of the following grounds:

I. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF TEXAS CONCERNING THE RETROACTIVE APPLICATION OF THE MICHELIN DECISION.

The petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3), which delimits the

[1] As stated by the Supreme Court of Texas, Honda "was plainly informed and put on notice by the City of Farmers Branch that the city considered that the goods were taxable, and that *Low v. Austin* and similar cases were wrongly decided. There is no basis for a contention that [Honda] relied on any previous action or non-action of the city because the city assessed the [Honda] property for taxes at its first opportunity." (Pet., p. A-9).

Court's certiorari jurisdiction over the judgments of state courts. Since there is no question in the present case concerning the validity of any statute, petitioner predicates jurisdiction on the clause granting certiorari jurisdiction "where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of * * * the United States."[2] Petitioner cites the Import-Export Clause of the United States Constitution, Article 1, Section 10, Clause 2, under the heading "CONSTITUTIONAL PROVISION INVOLVED." Its apparent position is that jurisdiction is predicated on the existence of a constitutional question. The present case, however, does not involve a constitutional issue. The question presented by the petitioner deals solely with the concept of prospective versus retroactive application of an interpretation of the Import-Export Clause. Though that interpretation is of constitutional origin, the interpretation itself and thus any constitutional question is no longer at issue.

In the benchmark case of *Great Northern R.R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), the Court held that a state court could refuse to give retroactive effect to a decision overruling a previous decision. Justice Cardozo opened the decision by stating, "we think the federal constitution has no voice upon the subject", 287 U.S. 358 at 364, and "we are not at liberty, by anything in the Constitution of the United States, to thrust upon those [state] courts a different conception either of the binding force of precedent or of the meaning of the judicial process." 287 U.S. 358 at 366.

This Court should follow the *Sunburst* reasoning in denying certiorari for a lack of a constitutional question.

[2] The language of 28 U.S.C. § 1257 (3) should be compared to the language of 28 U.S.C. § 1254 which grants power to this Court to review, by writ of certiorari, the decision of a federal court of appeals. Cases in the court of appeals "may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to *any civil or criminal case*, before or after rendition of judgment or decree . . . ." (emphasis added) The Court may review *any case and* is not limited to cases involving a right, privilege or immunity predicated on the Constitution or a federal statute.

Whether the courts of the different states allow a municipal or state tax to be assessed retroactively or only prospectively is a matter that is peculiarly within the jurisdiction of those courts. This is the type of issue that Section 1257 (3) was meant to restrict from the purview of this Court.

II. THIS IS NOT A PROPER CASE FOR REVIEW OF THESE ISSUES.

Notwithstanding petitioner's arousing argument that "this Court should pursue its supervisory function" to prevent differences from arising in various states (Pet. p. 6), we submit that it would be unfair and erroneous to initiate that pursuit in this case. Respondent has properly initiated and moved forward its legitimate legal claims for taxes duly assessed. Its position is identical to that of Gwinnett County, Georgia, and, therefore, should be treated by the courts of law in exactly the same way.

In any event, even if the issue were tested here, the standards of *Chevron* would under no circumstances require that the respondent be treated differently than Gwinnett County, Georgia was treated.

A. THIS CASE CANNOT BE DISTINGUISHED FROM MICHELIN.

The facts of the case at bar are identical to those presented in *Michelin*. In both cases, respondents assessed taxes on imported goods for 1972 and 1973. The importers sought declaratory and injunctive relief in their respective state courts. The sole difference is that Georgia, unlike Texas, has no intermediate appellate court. Consequently, the instant case was still in the state appellate courts when this Court decided *Michelin* and overruled *Low v. Austin*.

The decision in *Michelin* described the purposes which motivated the framers to add the Import-Export Clause to the Constitution. The framers wanted: (1) consistent regulation of commercial relations with foreign nations; (2) a

source of revenue for the federal government; and (3) promotion of harmony among the states. This Court decided in *Michelin* that a non-discriminatory ad valorem tax levied upon imports which have come to rest, would not contravene these specific goals.

Mr. Justice Brennan, speaking for the unanimous court, held that an importer should bear a share of the cost of police and fire protection, along with competitors handling only domestic goods. (96 S. Ct. 535, at 541.) It is undisputed that Honda has received the benefit of municipal services provided by Farmers Branch. It is also undisputed that Honda's competitors have paid their proportionate share of these costs. Michelin is liable for these taxes. Petitioner should also be liable for the taxes due and owing for the years in which it received these services.

The *Michelin* decision terminated the erroneous preferential treatment given to imports since the decision in *Low v. Austin*. Petitioner is asking this Court to extend this erroneous preferential treatment for an additional five years. Indeed, in this case, such a conclusion would entirely defeat the decision of the Texas Courts, since petitioner's warehouse is no longer located within the municipal boundaries of Farmers Branch. Therefore, its imports would never be subject to respondent's taxing authority.

The ultimate decision in *Michelin* was that the taxes imposed by Gwinnett County for 1972 and 1973 were fully collectable. This Court did not specifically reserve the question of the retroactive-prospective effect of *Michelin*, as it did in several cases cited by petitioner as authority for granting a writ of certiorari to consider the prospectivity of an earlier announced rule. *See e.g. Simpson v. Union Oil Co.*, 396 U.S. 13 (1969).

It was therefore quite necessary for the petitioner to ask this Court to "go beyond the four corners of this case" (Pet., p. 9), since the issues presented here were fully presented by the litigants in *Michelin*.

B. THE TEXAS SUPREME COURT CORRECTLY APPLIED THE STANDARDS OUTLINED IN CHEVRON.

The *Chevron* guidelines have never been considered mandatory, as argued by the petitioner,[3] but only as considerations applicable in those cases where retroactive application of a changed law or decision would work harsh and inequitable results.

But certainly this is not the case in which to test that issue, since the Supreme Court of Texas referred to these principles, and decided that *Michelin* should be applied without limitation.

Even if we liberally apply the *Chevron* general factors to our facts, it is evident that the equitable goals of that decision would not be served in this case. Those factors would support petitioner's obligation to pay its taxes for 1972 and 1973.

1. The decision must reverse "clear past precedent" on which the litigants may have relied.

Michelin overruled *Low v. Austin*, but that decision had already been tainted by this Court's decision in *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1959). This is the exact position that the respondent has taken since the inception of this suit.

Also, there is no indication that petitioner relied on prior precedent other than counsel's assertions that pricing was affected. We would assert that competition, and not costs, dictated pricing practices. If petitioner assumed that its profits would not be reduced by these taxes, it was simply mistaken.

[3] The Court itself in *Chevron* merely said that these principles *may* be looked to by courts in attempting to weigh the equities. 404 U.S. at 107. *See also Lemon v. Kurtzman*, 411 U.S. 192 (1973) [where this Court stated that the *Chevron* guidelines are helpful but are discretionary with each court]. Moreover, the Court in *Chevron* merely applied the procedural law dealing with the issue in question prospectively, but expressly held that in regard to the substantive matters in question, the overruling decision was to be applied retroactively. 404 U.S. at 108 f/n 10.

No amount of petitioner's optimism as to the outcome of its suit against respondent can be deemed to constitute "reliance." For each and every year, the petitioner has been aware of the precise amount of tax which would be due if it failed in its injunction suit against the respondent. This is not a case where the petitioner has relied upon inconsistent past actions of the respondent. This is not a case where both litigants relied on an erroneous decision.

The case at bar is clearly distinguishable from the decision in *Lemon v. Kurtzman*, 411 U.S. 192 (1973), which is cited by the petitioner for the proposition that reliance is justified even though "Farmers Branch had levied an ad valorem tax before *Low* was reversed." (Pet., p. 7.) *Kurtzman* presented the question of whether repayments should be made to the state for funds expended under a state law for the benefit of non-public schools, prior to the date that such law was declared unconstitutional. This Court held that the decision declaring the state law unconstitutional should be applied only prospectively, since the parties who claimed that the statute was unconstitutional had either abandoned or not sought repayments prior to the Supreme Court's decision. In the case at bar, there is not a "reaching back" to secure relief, since the tax was assessed in the very first year in which Honda became subject to the municipal tax.

This Court held in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974) that the existence of various theories on which a party may have lost vitiates his claim of "manifest injustice" when one of those theories is sustained by virtue of new law.

2. The prior history of the rule, its purpose and effect must indicate that retrospective effect would retard its operation.

The history of the Import-Export Clause indicates three reasons why it was added to the Constitution. Applying the decision in *Michelin* without limitation to the case at bar will

certainly not retard the (1) consistent regulation of commercial relations with foreign nations, (2) sources of revenue for the federal government, or (3) harmony among the states.

The primary purpose of the *Michelin* decision was not to allow "local government agencies to impose ad valorem taxes and to thereby require ultimate consumers to pay for the benefits and services accorded the goods." (Pet., p. 8.) The primary purpose of the decision was to force the importer to bear its share of the costs of municipal services and to terminate the preferential treatment afforded importers since *Low v. Austin*. (96 S. Ct. 535, at 541.) The Court in *Michelin* stated in a footnote that "depending on the relevant competition from domestic goods, an importer may be forced to absorb some of these ad valorem property assessments rather than passing them on to consumers." (96 S. Ct. 535, at 542, f/n 8.)

Petitioner argues that a retroactive application of *Michelin* would "reap a windfall in added revenues to taxing authorities without a corresponding increase, as *Michelin* intended, in the expense of local services for past years nor a proper allocation of such burdens to the ultimate consumers." (Pet., p. 8.) The petitioner's position seems to be that any taxes imposed upon importers should be paid by the consumers or not at all. This contention is neither reasonable nor logical. Perhaps, the petitioner is saying that it would have raised its prices, without regard to the competitive pricing of domestic wholesalers, if it had to pay taxes as did those domestic wholesalers. If that is the case, petitioner's ultimate complaint is that its domestic tax burden will result in a reduction of its profits. If this is, in fact, the ultimate basis of the petitioner's argument, it should be rejected.

3. Applying the new rule retroactively must produce substantial injustice or hardship in the case at bar.

Honda claims that a retroactive application of *Michelin* could cause it to "absorb all assessments of back taxes . . .

within the applicable periods of limitation." (Pet., p. 8.) The petitioner simply overlooks that its claimed tax exemption for each year was denied, and solely because of the agreement entered into between the litigants was collection delayed. Honda knew each year its potential liability and could have relied upon this potential liability "in ordering its business affairs with respect to locating warehouses, pricing goods, maintaining inventory levels, etc." (Pet., p. 7.) Farmers Branch should not be penalized if the petitioner did not make these business decisions.

Actually, inequity will result to Farmers Branch if the *Michelin* decision is limited by this Court. Farmers Branch has been in litigation for just as long as the taxing authority in *Michelin*. Farmers Branch has incurred substantial expenses in attempting to assert its constitutional right to levy a non-discriminatory ad valorem tax on imports. Farmers Branch has placed these imports on its tax rolls and budgeted its municipal activities and services relying on the collection of these amounts. Finally, Honda has moved its warehouse outside the municipal boundaries of Farmers Branch and is now not subject to municipal taxation by the respondent. Therefore, should this Court limit its decision in *Michelin*, Farmers Branch would be unable to collect any taxes for the municipal services rendered by it to the petitioner over the past five years.

In its final section, the petitioner attempts to persuade this Court to adopt a totally new judicial concept. It argues that all decisions which affect business relationships and transactions in any way, should be applied prospectively. This argument has repeatedly been rejected as an attempt to engraft upon a judicial decision the limitation placed upon legislation. It is well settled that legislation should have prospective effect, but that judicial decisions, except in extremely rare and unusual cases, should be applied without restriction.

CONCLUSION

For any and all of these reasons, a writ of certiorari should not issue to review the judgment and opinion of the Texas Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ronald M. Mankoff, do hereby certify that a true and correct copy of the foregoing Respondent's Brief In Opposition To Petition For Writ of Certiorari was served on the Petitioner by hand delivering a copy thereof to its attorney of record, Marvin S. Sloman, Carrington, Coleman, Sloman, Johnson & Blumenthal, 3000 One Main Place, Dallas, Texas, this 27th day of August, 1976.

Ronald M. Mankoff

RONALD M. MANKOFF

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